

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36020

| | | |
|-----------------------|---|----------------------------------|
| STATE OF IDAHO, |) | 2009 Unpublished Opinion No. 617 |
| |) | |
| Plaintiff-Respondent, |) | Filed: September 18, 2009 |
| |) | |
| v. |) | Stephen W. Kenyon, Clerk |
| |) | |
| DORIS LEE THOMAS, |) | THIS IS AN UNPUBLISHED |
| |) | OPINION AND SHALL NOT |
| Defendant-Appellant. |) | BE CITED AS AUTHORITY |
| |) | |

Appeal from the District Court of the Fourth Judicial District, State of Idaho, Ada County. Hon. Darla S. Williamson, District Judge.

Order denying motion to correct sentence, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Lori A. Fleming, Deputy Attorney General, Boise, for respondent.

Before LANSING, Chief Judge, PERRY, Judge
and GUTIERREZ, Judge

PER CURIAM

In 1998, Doris Lee Thomas pled guilty to first degree murder, committed in 1986, and grand theft, committed from 1992 through 1997. Initially, the district court imposed a fixed life sentence for the first degree murder and a consecutive fixed fourteen-year sentence for the grand theft. Ten days later, without notice to or presence of the parties, the district court modified Thomas's sentence for murder to an indeterminate life sentence because it believed a fixed period of confinement was contrary to law. The State filed a motion to reconsider. During a hearing on that motion, at which both the State and Thomas were present, the district court held that its original sentence was actually not contrary to law, vacated its modification order, and reinstated the original sentence. Then, in 2008, Thomas filed a Rule 35 motion for correction of an illegal sentence, arguing that her sentences exceed the statutory limits in effect at the time of

the commission of the offenses, impose multiple terms of incarceration for the same offense, and violate her constitutional rights; that the grand theft sentence should have been imposed according to the law in effect in 1986; and that the court did not have authority to reinstate the original murder sentence once the court had already made a modification imposing a less stringent sentence. Thomas appeals from the district court's denial of her motion. We affirm.

On appeal, Thomas argues her sentence for the murder conviction is illegal because the district court did not have legal authority to "increase" her sentence once the court had "reduced" it. However, it is unclear what other grounds Thomas asserts. In her Amended Notice of Appeal, Thomas argues the sentencing court erred by "applying incorrect law." Then, in her brief, she states "the district court did not have the legal authority to execute her fixed life sentence for first degree murder and her consecutive fixed fourteen-year sentence for grand theft." Because these phrases are ambiguous, this Court will assume that Thomas is asserting the same grounds, relating to applying incorrect law and lack of legal authority, that she argued in the district court. These grounds are: her sentences exceed the statutory limits in effect at the time of the commission of the offenses, should have been for indeterminate terms, and that the grand theft sentence imposes a multiple term of incarceration for the murder and should have been imposed according to the law in effect in 1986.

Under Idaho Criminal Rule 35, the district court may correct an illegal sentence at any time. Whether a sentence is illegal is a question of law freely reviewable by this Court. *State v. Josephson*, 124 Idaho 286, 287, 858 P.2d 825, 826 (Ct. App. 1993); *State v. Rodriguez*, 119 Idaho 895, 897, 811 P.2d 505, 507 (Ct. App. 1991).

A. The First Degree Murder Sentence

A person can only be sentenced under the law in force when the crime was committed. *State v. Eikelberger*, 71 Idaho 282, 289, 230 P.2d 696, 701 (1951). A first degree murder committed in 1986 was punishable by death or imprisonment for life. 1986 Idaho Sess. Laws ch. 232, § 2; 1977 Idaho Sess. Laws ch. 154, § 3. For felonies committed in 1986, a district court was authorized to sentence a defendant to a fixed term of confinement from two years up to the statutory maximum pursuant to then-existing Idaho Code § 19-2513A. 1986 Idaho Sess. Laws ch. 232, § 4; 1977 Idaho Sess. Laws ch. 243, § 1; *see also State v. Duvalt*, 126 Idaho 33, 878 P.2d 207 (Ct. App. 1994). Therefore, Thomas's fixed life sentence for first degree murder

committed in 1986 was not illegal because it was not in excess of the statutory limits and was not required to be indeterminate.

Neither is the sentence illegal because the court reimposed the original, harsher sentence after having modified the sentence to an indeterminate life term. In fact, the “reduced” sentence was the illegal sentence, not the reinstated original sentence, because a defendant must be present for sentencing and a sentence imposed in the absence of the defendant is invalid. *State v. Money*, 109 Idaho 757, 759-60, 710 P.2d 667, 669-70 (Ct. App. 1985). As Thomas was not present for the modification, that sentence was illegally imposed. Furthermore, Thomas cites no authority supporting her contention that a district court cannot correct an illegal sentence modification where the original sentence was stricter than the modified sentence.¹ Accordingly, the district court did not err in denying Thomas’s Rule 35 motion for correction of an illegal first degree murder sentence.

B. The Grand Theft Sentence

Grand theft committed from 1992 through 1997 was punishable by one to fourteen years of incarceration. 2001 Idaho Sess. Laws ch. 112, § 2; 1995 Idaho Sess. Laws ch. 216, § 1; 1987 Idaho Sess. Laws ch. 84, § 2. For felonies committed during this timeframe, a district court could sentence a defendant to a fixed term up to the statutory maximum. Idaho Code § 19-2513; 1993 Idaho Sess. Laws ch. 106, § 2; 1986 Idaho Sess. Laws ch. 232, § 3. Therefore, Thomas’s fixed fourteen-year sentence for grand theft was not illegal because it was not in excess of the relevant statutory limits and did not have to be indeterminate.

Thomas’s argument that the grand theft sentence imposes a multiple term of incarceration for the first degree murder is meritless. Grand theft and first degree murder are separate offenses with distinct elements. *See* I.C. §§ 18-2403, 18-2407, 18-4001, 18-4003. Additionally, the crimes were committed at different times. Thus, Thomas does not present a tenable argument that the crimes were the same offense. Thomas’s argument that the grand theft sentence should have been imposed according to the law in effect in 1986 is also meritless. As stated above, a

¹ On page 5 of Thomas’s Appellant’s Brief, she cites *State v. Duvalt*, 126 Idaho 33, 878 P.2d 207 (Ct. App. 1994) for the proposition that a “district court may not increase a previously imposed, but suspended sentence upon a finding that the defendant had violated the conditions of probation.” *Duvalt* does not discuss any facts, or adopt any holding, that would support this proposition.

person can only be sentenced under the law in force when the crime was committed. *Eikelberger*, 71 Idaho at 289, 230 P.2d at 701. Although Thomas argues her grand theft scheme started in 1986, she was sentenced only for thefts committed from 1992 through 1997 and, therefore, cannot be sentenced using 1986 statutes. In any event, the allowable sentence in 1986 was identical to that authorized in 1992-97. 1987 Idaho Sess. Laws ch. 84, § 2; 1983 Idaho Sess. Laws ch. 19, § 2. Therefore, the district court did not err in denying Thomas's Rule 35 motion for correction of an illegal grand theft sentence.

C. Conclusion

As neither the first degree murder sentence nor the grand theft sentence was illegal, the district court's order is affirmed.